Before the
LIBRARY OF CONGRESS
Washington, D.C. 20024

In the Matter of	)	
	)	
ADJUSTMENT OF RATES FOR NONCOMMERCIAL EDUCATIONAL BROADCASTING COMPULSORY LICENSE	)	Docket No. 96-6 CARP NCBRA

REPLY OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO PUBLIC BROADCASTERS' PETITION TO MODIFY THE DETERMINATION OF THE COPYRIGHT ARBITRATION ROYALTY PANEL AND BMI'S PETITION TO SET ASIDE OR, IN THE ALTERNATIVE, MODIFY THE PANEL REPORT

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Pursuant to 37 C.F.R. § 251.55(b), the American Society of Composers, Authors and Publishers ("ASCAP") hereby replies to Public Broadcasters' "Petition to Modify the Determination of the Copyright Arbitration Royalty Panel" ("PB's Petition") filed with the Librarian on August 5, 1998.[1] ASCAP also hereby provides a limited reply to the "Petition of Broadcast Music, Inc. to Set Aside or, in the Alternative, Modify the Panel Report" ("BMI's Petition").

I. ASCAP'S REPLY TO PUBLIC BROADCASTERS' PETITION

A. Ability to Pay Is Not an Issue in This Proceeding

At page 10 of their Petition, Public Broadcasters raise for the first time the claim that the fees awarded by the Panel to ASCAP and BMI "fail[] to assure a fair return to copyright owners without unfairly burdening public broadcasters" (emphasis added). Public Broadcasters do not

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[1] Capitalized terms not defined in this Reply are defined in the "Petition of [ASCAP] To Modify The Report Of The Arbitration Panel, Dated July 22, 1998 ("ASCAP's Petition").

attempt to quantify in any way the alleged "unfair burden" imposed by the Panel's determination of the ASCAP fee. More importantly, Section 118 of the Copyright Act does not contemplate an adjustment of what would otherwise be appropriate fees merely because of Public Broadcasters' financial circumstances. See ASCAP Reply PFFCL 14-15 ("ability to pay" irrelevant under § 118, unlike §§ 111 and 119).

No evidence exists supporting Public Broadcasters' claim of "unfair burden," nor did Public Broadcasters offer any such evidence for the Panel's consideration. ASCAP, on the other hand, did submit evidence relating to Public Broadcasters' extensive financial resources. That evidence demonstrated unequivocally that even the commercial-based fees sought by ASCAP and BMI in their Direct Cases represent a minuscule fraction of Public Broadcasters' total annual revenues. "Public Broadcasters," as a group, are comprised of hundreds of individual broadcasting enterprises which generated revenues in excess of $2 billion in 1996. (ASCAP Petition at 8). A number of these individual broadcasting enterprises, such as WNET in New York and WGBH in Boston, had nine-figure 1996 revenues. See ASCAP Dir. Exhs. 404 (WNET earned $101.3 million in 1996); 408 (WGBH earned $143.5 million in 1996); W.D. of Ledbetter 16. The revenue totals of the broadcasting stations do not reflect the substantial revenues received by PBS and NPR, which are also licensed under the ASCAP license. See ASCAP Exh. 14-X (PBS earned $334.4 million in 1996); PB Dir. Exh. 19 (NPR earned $69.7 million in 1996). Nor do these totals account for any of the huge increases in aggregate revenues which the Panel found to be expected by the Public Broadcasters before the year 2002, while still licensed under the same terms for the ASCAP license set by the Panel. (ASCAP Petition at 9; Report at 30).

The record thus demonstrates that Public Broadcasters can pay license fees substantially in excess of those awarded by the Panel without any significant fiscal or operational disruption. The following chart details the approximate costs per broadcast station and per broadcast

hour under various license fee scenarios and shows that Public Broadcasters' intimations of "undue burden" are baseless and contradicted by the record:

	PER TELEVISION STATION (352 total)	PER TELEVISION BROADCAST HOUR (2.3 million)[2]	PER RADIO STATION (707 total)	PER RADIO BROADCAST HOUR (4.6 million)
ASCAP FEE AS PER PANEL'S REPORT ($3,320,000)	$3,135	$0.47	$3,135	$0.48
ASCAP FEE AS PER ASCAP'S PETITION				
(a) ALL PROPOSED ADJUSTMENTS ($6,302,400)	$5,950	$0.91	$5,950	$0.91
(b) ADJUSTMENT USING 1976 REV'S ($4,450,000)	$4,200	$0.64	$4,200	$0.65
(c) ADJUSTMENT USING 1976 REV'S AND NO MUSIC USE FACTOR ($5,930,000)	$5,600	$0.86	$5,600	$0.87
(d) ADJUSTMENT USING 1976 AND TOTAL 1996 REVENUES ONLY ($4,730,000)	$4,460	$0.68	$4,460	$0.69
ASCAP'S FEE AS PROPOSED IN ITS DIRECT CASE (TV = $4,612,000; RADIO = $3,370,000)	$13,100	$2.01	$4,770	$0.73
TOTAL 1996 PB REVENUES (TV = $1,592,304,000 RADIO = $485,472,000)	$4,523,000	$396.40	$686,660	$105.50

For example, the bottom row of the chart shows that the "average" public television station earned $4.5 million in 1996, or nearly $400 per broadcast hour. If the Librarian were to

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[2] Television broadcast hours are calculated at pages 15-16 of ASCAP's Petition. For illustrative purposes, radio broadcast hours were assumed to be consistent with television, although they may be higher. ASCAP has also assumed, for illustrative purposes, that each public television and radio station would share the adjusted license fees pro rata, although there is nothing to prevent the stations from allocating fees according to station revenues (i.e., those stations with higher revenues pay higher fees and vice versa).

accept all of ASCAP's modifications requested at Section I of ASCAP's Petition, the total adjusted award ($6,302,400) would cost the "average" public television station less than $6,000 per year, or about 91 cents per broadcast hour. According to Public Broadcasters' data, that same "average" television station performed approximately 12 minutes of ASCAP music every hour of every day.[3] In light of Public Broadcasters' conceded dependence on copyrighted music in their operations, the bottom-line effects of the commercial-based fees proposed by ASCAP and BMI are relatively inconsequential. Public Broadcasters' expert economist, Dr. Jaffe, conceded that even if Public Broadcasters paid full commercial ASCAP and BMI rates, the resulting fee increase would fall well within the one to two percent annual fluctuation which occurs in Public Broadcasters' aggregate programming budgets. Tr. 2861-2864; BMI Exh. 5X; Tr. 4088-89.

B. The Panel Properly Discharged its Duty to Review the Evidence Presented by the Parties

The Librarian should also reject Public Broadcasters' inappropriate claims that the Panel failed to afford sufficient "weight" to Public Broadcasters' three prior, non-precedential license agreements with ASCAP or that it otherwise improperly rejected the three license agreements as appropriate fee benchmarks under Section 118. (PB's Petition at 4, 10-11, 13). Section 118 merely states that the Panel "may consider" license fees contained in prior agreements, not that it must give those agreements any particular Congressionally mandated probative value. ASCAP PFFCL 156-57. In any event, the Panel certainly did more than "consider" the prior ASCAP agreements -- it devoted four pages of its Report to an evaluation of each of Public Broadcasters' claims regarding the relevance of fees contained in those agreements. (Report at 20-23). The Panel then made a specific

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[3] W.D. of Jaffe, "Data Underlying Figures 5 and 6" (programs analyzed contained 19.48 minutes of music per hour in 1996); (Report at 32) (ASCAP had 60-61% share of all music in 1996).

factual finding that the fees in those agreements did not represent a fair market valuation of ASCAP's repertory. (Id. at 23). For the Panel's stated reasons (as well as those set forth at ASCAP PFFCL 165-70 and ASCAP Reply PFFCL 17-21), the Librarian should not disturb the Panel's factual finding.[4] Nor, for that matter, should the Librarian disturb the Panel's other findings relating to the disposition of this issue.[5] In particular, there is no basis for the Librarian to reevaluate the credibility of ASCAP's witnesses, such as Hal David, who testified as to the reasons ASCAP agreed to charge Public Broadcasters below market license fees in their prior agreements. (See PB's Petition at 15 n.2). Resolution of fact issues, such as witnesses' credibility, are clearly within the Panel's province. See National Ass'n of Broadcasters v. Librarian of Congress, No. 96-1449 n.13 (D.C. Cir. June 26, 1998) and cases cited therein ("The Panel, as the initial factfinder, is in the best position to weigh evidence and gauge credibility"). Moreover, the Panel's findings of fact should be given deference upon review, as set forth by the Court of Appeals for the D.C. Circuit:

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[4] Public Broadcasters also claim that the prior license agreements are independently probative because "the fees paid to each of ASCAP and BMI [in prior years] were in direct proportion to the parties' estimates of their respective music shares." (PB's Petition at 7). That alleged "finding" is specious. The evidence of prior negotiations shows that ASCAP routinely settled with Public Broadcasters on the basis of the 1978 Fee adjusted forward for inflation. BMI then accepted a portion of ASCAP's agreed fee based upon representations as to BMI's share of television performances. Because the BMI fee was based on a "share" of ASCAP fee, and BMI's share was based on its own perceived "music share," Public Broadcasters argue that ASCAP accepted a fee based on "music share" data. The undisputed record evidence is that ASCAP never valued its repertory based on "music share" in prior negotiations. (This principle, and the underlying facts, are discussed at ASCAP Reply PFFCL 26-28.)

[5] Public Broadcasters assail the Panel's findings of fact arguing, for example, that "the Panel gave undue weight to the testimony of [Michael Bacon]." (PB's Petition at 19-20). However, it is the Panel's duty as fact-finders to hear the testimony, to analyze it and to determine what, if any, weight should be given to it. In fulfilling its duty, the Panel heard Mr. Bacon's testimony about "complex interrelationships between 'up front' and 'back end' fees'" and synchronization rights, and properly gave such testimony its due weight.

> [A] reviewing body characteristically examines prior findings in such a way as to give the original factfinder's conclusions of fact some degree of deference. This makes sense because . . . the costs of providing for duplicative proceedings are thought to outweigh the benefits (the second would render the first ultimately useless) and because, in the usual case, the factfinder is in a better position to make judgments about the reliability of . . . evidence than a reviewing body acting solely on the basis of a written record of that evidence.

Id. (quoting Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 623 (1993)).

C. Prior, Subsidized Fees Are Not the Measure of Fair Market Value

In their Petition, Public Broadcasters also contend that the Panel applied the wrong standard for determining the "fair market value" of their access to ASCAP's repertory. (PB's Petition at 8-13). Contrary to that claim, the standard for "fair market value" as applied by the Panel in this proceeding is wholly consistent with precedent. Under the compulsory license regulations, as interpreted by the Librarian, fair market valuation involves a comparison of what various similar users of copyrighted materials pay for those uses in arms' length transactions. For example, in agreeing with the panel's decision in the recent Satellite Rate Proceeding, the Librarian held:

> The Panel determined that 'fair market value' meant the price that would be negotiated between a willing buyer and a willing seller in a free marketplace. Panel Report at 17. The Register determines that this is not an arbitrary interpretation of the meaning of 'fair market value.' Nor is it contrary to law.

In Re Adjustment for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP-SRA, 62 Fed. Reg. 55742, 55747 (Oct. 28, 1997) (the "Satellite Rate Proceeding"). The quoted passage is essentially the standard applied by the Panel in the Report. (Report at 9).

Under this standard, what Public Broadcasters' may have paid in the past for access to ASCAP's repertory is entitled to little weight in light of the Panel's findings regarding the circumstances under which the prior agreements were made and the parties' specific designation of

those agreements as "non-precedential."[6] By enacting Section 118, Congress did not intend that copyright owners would be compelled to "subsidize" public broadcasters or that license fees available to owners would be any less than those available in the general marketplace. (Report at 9); ASCAP PFFCL 153-54. Here, there is no basis to overturn the Panel's specific finding that, in each of ASCAP's prior agreements with Public Broadcasters, ASCAP had voluntarily charged Public Broadcasters below market fees for numerous reasons that the Panel deemed credible. (Report at 22); ASCAP PFFCL 121-33; ASCAP Reply PFFCL 21-24. Nor did the Panel err when it recognized that Public Broadcasters' circumstances have changed significantly and that ASCAP therefore had good reason to discontinue its practice of charging Public Broadcasters below market fees. Public Broadcasters' recent, self-acknowledged financial and operational successes were thoroughly documented for the Panel. Public Broadcasters are now a major economic force in broadcasting and are competitive in most respects with their commercial colleagues. Continued solicitude for Public Broadcasters (a solicitude born, in large part, from Public Broadcasters' prior fiscal and political crises) is, in ASCAP's view, no longer necessary. Thus, ASCAP should not be, and there is no reason for it to be, compelled to continue its voluntary subsidy.

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6 In petitioning for a greater emphasis on prior agreements, Public Broadcasters selectively cite to the Librarian's statement in the recent DSTRA proceeding. (PB's Petition at 11-12). In full, the Librarian stated, "Congress encourages interested parties to negotiate among themselves and set a reasonable rate which inevitably affords fair compensation to all parties." Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25394 (1998). It certainly does not follow from this statement that voluntary agreements, by definition, afford "fair market value." If that were the case, one would expect that Congress would have required examination of prior agreements under Section 118 as part of a rigid set of statutory criteria for setting rates. There is no evidence that, in making a Panel's review of prior agreements permissive ("the [Panel] may consider"), Congress "did not mean what it said." See Satellite Rate Proceeding at 55747.

II. ASCAP'S REPLY TO BMI'S PETITION

ASCAP agrees with the essential points of BMI's Petition, particularly those relating to the flaws in the Panel's application of the 1978 Trending Formula including: (1) its improper use of 1978 revenue figures instead of the 1976 figures available to the CRT; (2) its flawed reliance on total revenues, rather than "private" revenues, as the best gauge the material shifts in Public Broadcasters' financial position since 1978; and (3) its failure to account for the total increase in Public Broadcasters' music use since 1978.

As to this last point, ASCAP notes that it believes that BMI may have apparently misperceived the nature of the Panel's presumption that Public Broadcasters' music use has not changed substantially since 1978. (Report at 32). ASCAP proceeded in its Petition on the premise that the Panel, which was only presented with evidence as to rates of music performance, necessarily "presumed" that Public Broadcasters' rate of performance was static since 1978. (ASCAP Petition at 15-17). BMI, unlike ASCAP, infers in its Petition that the Panel presumed that Public Broadcasters' "gross" music use was static (i.e., that the Panel looked at the average rates of performances in 1978 and 1996 and then multiplied those rates by total annual broadcast hours to reach "total annual performances" in each of the two years). (BMI Petition at 30-31). BMI's inference, however, does not appear to be supported by any factual finding from the record. Nor is there any evidence that the Panel considered the effect of rising broadcast hours on "total performances."[7] To the contrary, the

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[7] No party quantified the effects of rising broadcast hours on the music use data because music use was only analyzed in recent years, when total broadcast hours have been relatively static. (ASCAP Petition App. D. at 2). It is only when one attempts to reach back to 1978 that total hours becomes a significant factor. Thus, in preparing a conservative estimate as to any changes in total performances of ASCAP music use since 1978, ASCAP's expert, Dr. Boyle, assumed static total ASCAP performances, even though total hours had risen dramatically. ASCAP PFFCL 116-17.

Report demonstrates that the Panel overlooked that broadcast time available to Public Broadcasters for performing ASCAP and BMI music has more than doubled during the twenty years since the 1978 CRT Decision. (ASCAP Petition at 15-16). Had the Panel taken this growth into account, it would not have found that total music performances were static since 1978. To correct this manifest error by the Panel, the Librarian should reject the Panel's downward music use adjustment based on that analysis.

CONCLUSION

For the foregoing reasons and the reasons set forth in ASCAP's Petition, ASCAP respectfully requests that the Librarian:

(a) make the modifications requested in Section I of ASCAP's Petition;

(b) adopt the method of determining fees for ASCAP as set forth in Section II of ASCAP's Petition, if it rejects the trending methodology used by the Panel;

(c) reallocate the costs assessed, equally between copyright users and owners; and

(d) deny Public Broadcasters' Petition.

Dated: New York, New York
August 19, 1998

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CERTIFICATE OF SERVICE

I am an associate at White & Case. On August 19, 1998, I caused to be served by hand or courier express/same day delivery true copies of the foregoing Reply of the American Society of Composers, Authors and Publishers To Public Broadcasters' Petition to Modify the Determination of the Copyright Arbitration Royalty Panel and BMI's Petition to Set Aside or, in the Alternative, Modify the Panel Report on the following persons:

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